

NTSB Order No.
EM-126

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 8th day of November, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard

vs.

CONRAD P. NILSEN, Appellant.

Docket ME-112

OPINION AND ORDER

Appellant seeks reversal of a February 22, 1985 decision of the Vice Commandant (Appeal No. 2382) affirming a one month suspension of his mariner's license (No. 500856) for negligent navigation of the SS SAN JUAN, an 18,455 gross ton container-carrying vessel. The suspension had been ordered by Administrative Law Judge Francis X. J. Coughlin on July 1, 1982, following an evidentiary hearing that concluded on March 31, 1982.¹ The law judge found prove a specification alleging that appellant, on February 11, 1984, had caused the SS SAN JUAN to ground by failing to stay within Bar Channel while departing San Juan Harbor, Puerto Rico. On appeal to the Board, appellant contends in effect that the Coast Guard charge cannot be sustained because it is based on a presumption of negligence that appellant's evidence adequately rebutted. We find no merit in appellant's contention and will deny his appeal.²

As a starting point we note that appellant does not challenge the Coast Guard's position that a presumption of negligence on his part, as the person responsible for a vessel's navigation, arose by virtue of the vessel's grounding on a charted rock shoal outside of the designated navigation channel. Rather, he maintains that the presumption was overcome by his showing that factors other than his alleged negligent operation could have caused the grounding.

¹Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

²The Coast Guard has filed a reply brief opposing the appeal.

Specifically, appellant asserts that the casualty could have occurred as the result of his efforts to steer around small boat traffic in the channel at a time when there was a more westerly than normal set acting on his vessel. We share the Coast Guard's conclusion that these factors, whether considered singly or in combination, did not defeat the prima facie case the presumption of negligence established.

The facts of the incident are discussed at length in the decisions of the law judge and Vice Commandant and will not be repeated here except as necessary to review appellant's arguments on appeal. Appellant was serving as Master aboard the SS SAN JUAN on the date in issue.³ The grounding occurred in connection with the vessel's right turn into the Bar Channel from the Anegado Channel. Appellant adduced evidence to the effect that one or more small boats, perhaps fishing boats, visible by their lights, were situated some 50 to 75 feet inside the right side of the 500 foot wide channel somewhere between buoys 5 and 3.⁴ Testimony established that about the same time or shortly after this sighting, which was reported to the bridge, the vessel made a gradual turn to the left and continued on a track that took it across and outside of the left side of the channel where the vessel grounded while in the process of turning back to the right.⁵ Appellant's radio transmissions to the Coast Guard reporting the grounding and requesting assistance of tugs made no mention of any problem with fishing boats in the channel or with the current in the harbor. Rather, those transmissions indicated that appellant's only difficulty in navigating the vessel from the Anegado Channel into the Bar Channel had been that he could not locate one of the lighted buoys (buoy 2) on the left side of the latter channel.⁶ It is possible, therefore, if not highly probable, that while appellant was looking for buoy 2 he allowed the vessel to travel

³The SS SAN JUAN is 659 feet long and 78 feet in breadth.

⁴The record does not reveal whether the small boats were anchored or underway.

⁵The SS SAN JUAN sounded no warning whistles with respect to the small boat traffic in or near the channel, and there appears to have been no special concern paid to the matter at the time. In other words, the presence of the small boats seems to have been treated as a routine circumstance and not an exigent occurrence.

⁶The radio transmissions are set forth in I. O. Exh. 9. The relevant portions are set forth in the law judge's decision at pages 8-9.

across the channel when it should have been turning to starboard to keep within the channel. As a result, by the time it was recognized that buoy was not on station, the vessel already may have been beyond the edge of the channel, or nearly so, and a turn to the right initiated at that point would not have averted a grounding on the shoal to the west (i. e. to the left) of buoy 2's usual location.⁷

While the appellant's radio transmission concerning the grounding referred only to his inability to sight buoy 2,⁸ the law judge and the Vice Commandant considered appellant's arguments to the effect that his navigation of the SS SAN JUAN had been "embarrassed" by small boat traffic in the channel and that the vessel had been subjected to a stronger than normal set.⁹ We share their conclusion that assuming the existence of these circumstances as established by appellant's evidence, appellant did not rebut the presumption that the grounding was attributable to his negligence. The record simply does not support the suggestion that the SS SAN JUAN, given a 500 ft wide channel, could not have been maneuvered safely around andy fishing boats that were apparently no more than 50 to 75 feet inside the channel on the right. Nor was the existence of a 7 degree rather than the normal 3 to 5 degree set shown to have been a factor that could not have been detected and accommodated through routine navigational observations and course adjustments.¹⁰ In sum, appellant did not establish that he had

⁷The fact that buoy was missing had been broadcast by the Coast Guard. This information was recorded in the chart room on the SS SAN JUAN.

⁸Appellant, who did not testify at the hearing, did not argue to the Coast Guard and does not argue here that the grounding or departure from the channel was caused by the missing buoy. We note, in this connection, that appellant's ability to navigate the vessel safely down the channel and out of the harbor essentially was unaffected by the missing buoy since there was a range to the vessel's stern.

⁹There is, however, no direct evidence that appellant's actual navigation of the vessel outside of the channel was due to traffic or current or both.

¹⁰Our decision in Commandant v. Jahn NTSB Order EM-88 (1981) does not dictate a reversal of the suspension ordered in this proceeding, as appellant asserts. In Jahn, we stated that "where a party charged with negligence responds with a showing that the presumptively blameworthy occurrence could have resulted from factors other than his alleged negligent operation, the inference

encountered circumstances beyond his control that made a grounding inevitable or unavoidable. It follows that the presumption of negligence the grounding raised survived appellant's effort to rebut it.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and
2. The decision of the Vice Commandant affirming the order of the law judge suspending appellant's seaman license for one month is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman and BURSLEY, Member of the Board, concurred in the above opinion and order.

is negated." This does not mean that the charged party, as part of the showing necessary to rebut the presumption, does not also have to demonstrate that the "other factors" could not have been anticipated and negotiated without incident through the exercise of prudent seamanship, as appellant appears to believe. The evidence adduced by the appellant in Jahn demonstrated that either oversteer by the helmsman or uncharted shoaling could have produced the uncontrollable sheer that resulted in the vessel's grounding after a collision with a navigation beacon. Evidence as to the existence of such shoaling was presented. In the instant case, by contrast, the appellant showed essentially no more than that he was required to steer around other traffic in a channel and cope with a more westerly than usual current. Unlike Captain John, appellant did not establish that he was not, or could not have been, able to retain control of the vessel notwithstanding the factors he cites as affected his navigation.